# EXHIBIT 1

# AGRICULTURAL ORGANIZATIONS RESPONSE TO NOTICE OF WRITTEN PUBLIC COMMENT PERIOD FOR AG ORDER 4.0 CONCEPTUAL REGULATORY REQUIREMENT OPTIONS

On November 19, 2018, the Central Coast Regional Water Quality Control Board (Central Coast Water Board) issued a Notice of Written Public Comment Period for Ag Order 4.0 Conceptual Regulatory Requirement Options (Notice). In the Notice, the Central Coast Water Board invited stakeholders to provide comments and propose alternatives to the Ag Order 4.0 Conceptual Regulatory Requirement Options (Options) presented in the Notice.

In response to the Notice, the Agricultural Organizations (Ag Organizations) have compiled a complete packet of comments, proposed alternatives, technical justifications and supporting rationale to assist the Central Coast Water Board in this process. This attachment, Exhibit 1, provides written comments on the legal and policy requirements that Ag Order 4.0 must satisfy, and specifically responds to issues raised by the Conceptual Regulatory Requirement Options Tables (Options Tables). The Ag Organizations have also proposed alternatives to the Options presented in Options Tables 1 through 5, which are discussed at length in Exhibit 2.

## I. GENERAL LEGAL AND POLICY CONCERNS

### A. State Law Requires the Central Coast Water Board to Balance Competing Demands in All of its Decisions

In 1969, the California Legislature adopted the Porter-Cologne Water Quality Control Act (Porter-Cologne). (See Wat. Code, §13000, et seq.) Porter-Cologne, and its program for water quality control, incorporated recommendations contained in the Final Report of the Study Panel to the California State Water Resources Control Board. (See Attachment 1 to Exhibit 1, *Recommended Changes in Water Quality Control: Final Report of the Study Panel to the California State Water Resources Control Board* (Final Report) (March 1969).) An overarching theme throughout the Final Report is the need for proper balancing and sound judgment in regulating water quality, and specifically balancing the benefits versus the costs to society. (See, e.g., Final Report, p. 7 ["The regional and state boards which, in their decisions in which policy is applied to specific cases, weigh the benefits and costs to society, are the ones who actually determine this balance. In performing this function, there is no substitute for sound judgment."].)

As part of the Final Report, the Study Panel included recommended changes to the Water Code, which then became the foundation of Porter-Cologne. Water Code section 13000 was part of these recommendations, and was adopted as proposed in the Final Report. These legislative directives include the second paragraph of section 13000, which states:

> The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to *attain the highest water quality which is reasonable*, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.

(Wat. Code, § 13000, emphasis added.)

The Final Report explains that this language is intended to identify the different kinds of values that Regional Water Quality Control Boards (regional boards) will need to consider in evaluating the highest water quality which is reasonable, as applied to specific situations. (Final Report, Appendix A, p. 20-21.)

Further, the Legislature explicitly requires the State Water Resources Control Board (State Water Board) and the regional boards to "… conform to and implement the policies of this chapter, and shall, at all times, coordinate their respective activities so as to achieve a unified and effective water quality control program in this state[]" when exercising any power granted under Porter-Cologne. (See, Wat. Code, § 13001; see also *id.*, § 13240 ["Each regional board shall formulate and adopt water quality control plans for all areas within the region. Such plans shall conform to the policies set forth in Chapter 1 (commencing with section 13000) of this division and any state policy for water quality control."].) In its decision in *City of Burbank v. State Water Resources Control Board*, the California Supreme Court discussed the Legislature's intent, confirming its goal "to attain the highest water quality which is reasonable." (*City of Burbank v. State Water Resources Control Bd*. (2005) 35 Cal.4th 613, 619 (*City of Burbank*).) Accordingly, all regional boards (including the Central Coast Water Board) must balance all of the demands placed on California's waters, including economic and social demands, when exercising their authority.

The use of the terms "reasonable" and the "reasonableness" standard are not limited to the express goals laid out in Water Code section 13000. Rather, Porter-Cologne calls for reasonable actions throughout. (See, e.g., Wat. Code, § 13241 [calling for water quality objectives (WQOs) that will provide "*the reasonable protection of beneficial uses*" upon mandated review of specific factors including economics (emphasis added)]; *id.*, § 13050(h) [defines "water quality objectives" as "the limits or levels of water quality constituents or characteristics which are established for *the reasonable protection of beneficial uses of water* or the prevention of nuisance within a specific area" (emphasis added)]; *id.*, § 13263 [requiring regional boards to take into consideration "water quality objectives *reasonably required*" to protect beneficial uses as well as all provisions of section 13241 when prescribing discharge requirements (emphasis added)]; *id*., § 13267(b)(1) [requiring technical or monitoring program reports for waste discharge requirements (WDRs) or conditional waivers to "bear a *reasonable relationship* to the need for the report and the benefits to be obtained" (emphasis added)].)

Thus, when analyzing impacts to water quality and adopting permits regulating irrigated lands, the Central Coast Water Board must comply and conform with Porter-Cologne's

"reasonableness standard"; that is, evaluate whether the activity or control limit will *reasonably* protect the beneficial uses considering all demands being made and to be made on those waters and the total values involved," including both environmental and agricultural values, "beneficial and detrimental, economic and social, tangible and intangible." (Wat. Code, § 13000, emphasis added.)

In addition to the guiding principal of water quality regulation in California—reasonableness and balancing competing uses (see, e.g., Wat. Code, § 13000)—it is important to acknowledge that California law recognizes many beneficial uses of water, including domestic use and agricultural irrigation use. The Options and statements within the Notice attempt to mischaracterize and ignore relevant law in such a manner that may impose extreme regulations on irrigated agriculture, and could debilitate the region's agricultural industry. We agree that there are water quality issues in the region that must be addressed by the irrigated lands regulatory program; but, contrary to the Options, the mere existence of a water quality issue does not compel adoption of extreme regulations that are aimed to protect water quality and disregard the economic and social impact on the region and the state. Rather, Porter-Cologne requires a balance of the various demands on the state's waters.

Moreover, when adopting waste discharge requirements,[1] Porter-Cologne requires the regional board to take into consideration "the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241." (Wat. Code, § 13263(a).) These provisions that are required to be considered include, in part, water quality conditions that can reasonably be achieved through the coordinated control of all factors affecting water quality as well as economic considerations. (See Wat. Code, § 13241.) In other words, in its development of waste discharge requirements, the Central Coast Water Board is mandated to consider the reasonableness of meeting the WQOs in question, as well as economic considerations. Such considerations must be more than conclusory findings, and findings must be supported by substantial evidence in the record. (See *Environmental Protection Information Center v. California Department of California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 516-517; see also *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Board* (2012) 210 Cal.App.4th 1255, 1268.)

Also, adequate consideration of economics does not stop with a blanket acknowledgement of potentially heightened costs of compliance, but needs at least some estimate of the costs of compliance. (See, e.g., *City of Gardena v. Regional Water Quality Control Board, Los Angeles Region* (Super Ct. Orange County, Dec. 31, 2018, No. 30-2016-00833722-CU-WM-CJC).) Further, Porter-Cologne provides regional boards with the authority to relax permit requirements due to consideration of costs. (See *City of Burbank v.*

[1] In Exhibit 2, we recommend that Ag Order 4.0 be adopted as a General Order under Water Code section 13263, rather than a Conditional Waiver under Water Code section 13269. In summary, the requirements imposed on agriculture in Ag Order 3.0 (and those proposed for Ag Order 4.0) are well beyond what one would consider to be "conditions" for a waiver. They are nothing short of waste discharge requirements and thus should be adopted under the appropriate statutory provision in the Water Code.

*State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 626, fn. 7 ["State law, as we have said, allows a regional board to consider a permit holder's compliance cost to *relax* pollutant concentrations, as measured by numeric standards, for pollutants in a wastewater discharge permit."].)"

### B. Nonpoint Source Pollution Is Different than Point Source Discharges and Is Treated Differently Under State and Federal Law

Next, we remind the Central Coast Water Board that nonpoint source pollution is different than discharges from point sources and is, accordingly, treated differently under the law. For instance, the Clean Water Act (33 U.S.C. § 1321 et seq.) expressly differentiates the control of nonpoint sources of pollution from point sources. In section 319 (33 U.S.C. § 1329), the Clean Water Act provides that states will create and implement means for managing nonpoint sources. The Clean Water Act places the onus on states to develop best management practices (BMPs) or other measures that the state finds will "reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source." (33 U.S.C. § 1329(a)(1)(C).) This BMP focus is in contrast to the National Pollutant Discharge Elimination System in section 402 of the Clean Water Act, which relies on treatment and water quality-based effluent limitations as the means through which discharges from point sources will be regulated. (33 U.S.C. § 1342(a)-(b).) This contrast in approaches reflects the inherent differences between the types of discharge, primarily that treatment is more feasible when the discharge is from a discrete point source as compared to the diffuse discharge seen in nonpoint source discharges.

California draws a similar distinction between controlling nonpoint source pollution and point source pollution. Specifically, the Water Code provides that nonpoint sources will be managed through a program based on implementation of BMPs. (Wat. Code, § 13369.) The State Water Board also recognizes that "[n]onpoint source discharges, such as irrigated lands discharges, pose unique challenges that are not easily addressed by strategies designed to address point source pollution." (SWRCB Order WQ 2018-0002, *In the Matter of Review of Waste Discharge Requirements General Order No. R5-2012-0116 for Growers Within the Eastern San Joaquin River Watershed that are Members of the Third-Party Group*, p. 14 (ESJ Order).) Thus creative solutions, primarily those related to management practices rather than treatment, are key to regulating nonpoint source discharges. (*Id.* at p. 15.) The Regional Board also noted that "[n]onpoint sources of water pollution are . . . diffuse (spread out over a large area). These sources are not as easily regulated or controlled as are point sources." (Central Coast Regional Water Quality Control Board, *Water Quality Control Plan for the Central Coastal Basin* (Sept. 2017 ed.), p. 45 (Basin Plan).)

The opinion in *Monterey Coastkeeper* does not change the fact that nonpoint pollution is different, and approaches for addressing nonpoint source pollution should be different as compared to those used for point sources of pollution. (*Monterey Coastkeeper v. State Water Resources Control Board* (2018) 28 Cal.App.5th 342, 369 (*Monterey Coastkeeper*).) Rather, the Court found that under the Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (NPS Policy), management practices in and of themselves are not

WQOs and cannot be used as a substitute for meeting WQOs. The Court also found that the NPS Policy requires time schedules and quantifiable milestones for ensuring that such water quality objectives are *eventually* met. However, neither the NPS Policy or the *Monterey Coastkeeper* opinion reject the use of management practices as the approach for addressing nonpoint source discharges.

## II. LEGAL LIMITATIONS ON AG ORDER 4.0

### A. The Nonpoint Source Policy Does Not Require Numeric Limitations

Neither the NPS Policy nor the appellate decision in *Monterey Coastkeeper* implicitly or explicitly require numeric discharge limits. (*Monterey Coastkeeper*, *supra*, 28 Cal.App.5th at p. 370.)

The NPS Policy's requirement for quantifiable milestones does not equate to a requirement for numeric limits. Key element 1 states that nonpoint source pollution must be addressed in a manner that achieves and maintains water quality standards. Key element 3 requires time schedules and milestones that are designed to measure progress toward achieving water quality standards. The Options, which are primarily centered on the inclusion of numeric limits, present an extreme view of the NPS Policy and ignore the fundamental nature of nonpoint source pollution. In addition, the Central Coast Water Board's express approach for addressing nonpoint source pollution as contained in the Basin Plan states that "[t]he Regional Board will generally refrain from imposing effluent requirements on discharges that are implementing Best Management Practices in accordance with a waiver of waste discharger [*sic.*] requirements . . . or other State or Regional Board formal action." (Basin Plan, p. 46.) The Basin Plan also reiterates the diffuse nature of nonpoint sources and the associated difficulty in regulating these sources as compared to point sources. (*Id.* at p. 45.)

Similar to the NPS Policy not requiring numeric limits, the appellate court in *Monterey Coastkeeper* did not conclude that numeric limits are a necessary element of an NPS control implementation program. Rather, the holding was limited and fact specific.[2] The Court of Appeal found fault with the specific provision of the permit revised by the State Water Board, because "the State Board is rewriting – or amending – the NPS Policy by replacing the required element of specific time schedules and quantifiable milestones with a vague requirement of 'improved' management practices and a 'conscientious effort.'" (*Monterey Coastkeeper*, *supra*,

[2] It is important to highlight that the Court of Appeal concluded "Provision No. 83.5 is the crux of this dispute" regarding compliance with the NPS Policy. (*Monterey Coastkeeper v. State Water Resources Control* Bd. (2018) 28 Cal.App.5th 342, 368.) The Court of Appeal **did not** conclude that the State Board's revised Ag Order in its entirety failed to contain time schedules and milestones, as required by NPS Policy key element 3. Rather, the Court of Appeal found that the modified Ag Order did in fact contain time schedules and milestones for numerous provisions that comply with the NPS Policy and key element 3, such as backflow prevention devices, abandoned groundwater wells, and reduction in turbidity or sediment load, nutrients, and nitrogen. *(Ibid.)* The Court of Appeal's limited holding found fault with the terms of Provision 83.5, as that specific provision failed to contain concrete time schedules and milestones. (*Id*., pp. 368-370.)

28 Cal.App.5th at p. 370.) Thus, since the State Water Board's revised Ag Order (i.e., Ag Order 3.0) contained Provision 83.5 that required a conscientious effort to improve management practices rather than specific time schedules, the Court of Appeal concluded that the permit did not comply with the NPS Policy because it could not be determined that there would be a "'high likelihood' the program will succeed in achieving its objectives, as required by NPS Policy." (*Ibid*. [internal quotes omitted].)

Thus, the Court of Appeal did not hold that an nonpoint source control implementation program is required to include numeric limits. Nowhere in the Court of Appeal's decision did the court conclude or even imply that numeric limits are required in an order regulating nonpoint source discharges for that order to be in compliance with the NPS Policy.

Moreover, the ESJ Order, does not mandate, encourage, or suggest that numeric limits are required in an irrigated lands program. In fact, the ESJ Order suggests the opposite:

> In a permit for a traditional point-source facility, the water boards set a water quality-based effluent limitation to be met at the discharge point and require monitoring of the discharge to verify that the limitation is being met. As we will discuss in greater detail in the section on surface water and groundwater quality monitoring, ***in a landscape-based, nonpoint source program such as the irrigated lands regulatory program, monitoring the numerous and sometimes indeterminate set of all farm discharge points to surface water and groundwater is an impractical, prohibitively costly, and often ineffective method for compliance determination and the Nonpoint Source Policy accordingly does not mandate such monitoring***. As a result, a nonpoint source regulatory program simply may not yield enough data to conclusively establish whether a specific individual discharger is in fact causing or contributing to exceedances. Recognizing this challenge, the Nonpoint Source Policy provides that, although management practice implementation is not a substitute for actual compliance with water quality requirements, a schedule of management practice implementation, assessment, and adoptive management may act as a proxy for assessing regulatory program progress.
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> (ESJ Order, *supra*, at pp. 18-19. (Emphasis added.))

From this, and from the fact that the ESJ Order does not revise the underlying WDR to include numeric limits, we can confidently conclude that numeric limits are not mandated by the ESJ Order, or the State Water Board's interpretation of the NPS Policy. Rather, the State Water Board finds that management practice implementation, assessment, and adaptive management may act as a proxy for assessing regulatory program progress.[3]

Furthermore, numeric discharge limitations are not necessary to comply with the NPS Policy's requirement that permits contain "quantifiable milestones." The NPS Policy does not

[3] Notable, the ESJ Order does include receiving water limits, and time schedule provisions for meeting such limits.

define the phrase "quantifiable milestone." The State Water Board has upheld and modified the ESJ Order, which uses other requirements as quantifiable milestones rather than discharge limitations to regulate nonpoint source pollution. For instance, the State Water Board upheld the ESJ Order's approach for irrigated agriculture discharges that used receiving water limitations combined with management practices rather than edge-of-field discharge limitations. (See ESJ Order, *supra*, at pp. 22-23.) This is consistent with an application of the NPS Policy that considers statutory policy directives from the legislature, such as Water Code section 13000, which provides that "activities and factors which may affect the quality of the waters of the state shall be regulated to attain the *highest water quality which is reasonable*, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (Emphasis added.)

**B. Application of the NPS Policy Cannot Result in an Impossibility of Compliance**

The NPS Policy must be construed and applied pursuant to Civil Code sections 3509 and 3531. Together, these code sections provide that statutes – and by extension regulations like the NPS Policy – should be interpreted to avoid requiring the impossible. (See *National Shooting Sports Foundation v. State of California* (2018) 5 Cal.5th 428, 433 (*National Shooting Sports*).) Civil Code section 3531 sets forth the implied exception to statutory requirements based on impossibility of performance. (See *id.* at pp. 433-434.) Thus, before adopting numeric limitations, the Central Coast Water Board needs to carefully consider if compliance with such limitations would create an impossibility of performance for all or most growers in the Central Coast, based on economic and technological constraints to achieving such limitations. In addition to Civil Code section 3531, the NPS Policy itself acknowledges that waste discharge requirements must consider the factors listed in Water Code section 13241, which include economic considerations and the water quality that can reasonably be achieved. (NPS Policy, at p. 4.) This express direction demonstrates that the State Water Board intended requirements issued pursuant to the NPS Policy to include conditions that are attainable by the permittee, considering all surrounding circumstances.

Additionally, the NPS Policy is intended to guide regional boards in developing requirements that have a high likelihood of compliance with WQOs; it was not intended to bring about financial ruin to those subject to the policy. (See, e.g., *Sutro Heights Land Co. v. Merced Irrigation District* (1931) 211 Cal. 670, 703 [holding that the intent behind a statute could not have been to require construction of facilities so expensive it was "beyond [the defendant's] financial ability to meet or pay for."].) The State Water Board's intent regarding the NPS Policy and irrigated agriculture can be seen in past State Water Board orders, such as the ESJ Order. There, the State Water Board acknowledged that "[c]ollectively, we have a responsibility to acknowledge these [water quality] impacts and address them, but in a manner that preserves the economic viability of agriculture." (ESJ Order, *supra*, at p. 3.) This recognizes the balance that the State Water Board and the Central Coast Water Board must make between protecting water quality and ensuring that agriculture remains viable in California, and in the Central Coast. Accordingly, State Water Board regulations and orders, including the NPS Policy, should not be

applied in a manner that would bring financial ruin to agriculture through imposition of overly onerous waste discharge requirements.

### C. The *Monterey Coastkeeper* Decision Must Be Read Narrowly

The Third District Court of Appeals decision in *Monterey Coastkeeper* must be read narrowly in light of the holding, which was based on de novo review. The decision renders the trial court's prior decision no longer valid, and criticizes some findings in the trial court's decision. (See *Monterey Coastkeeper*, *supra*, 28 Cal.App.5th at p. 363 ["While the [trial] court primarily criticized the *approach* of the modified waiver, we focus on whether the *conditions* in the modified waiver are consistent with the basin plan"] .) When an appellate court reviews a trial court decision based on whether the trial court applied the law correctly, as occurred in *Monterey Coastkeeper*, the appellate court gives no deference to the trial court's legal determinations. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 384 [*Haworth*].) Thus, an appellate court can affirm the trial courts ultimate ruling regardless of whether the same legal analysis led to that outcome. (*In re Marriage of Smith* (2015) 242 Cal.4th 529, 522.) This is what occurred in *Monterey Coastkeeper*: the opinion recognizes that the trial court reached the correct result with respect to the modified waiver's compliance with the NPS Policy, but disagreed with the reasoning that brought the trial court to that conclusion. In this scenario, the appellate court's reasoning takes precedence over the trial court's and controls future cases. (See *Haworth*, *supra*, at p. 384.) Therefore, the reasoning in the trial court's decision is no longer valid and should not be applied in the context of Ag Order 4.0 or any future orders.

Accordingly, the opinion in *Monterey Coastkeeper* must be read as it interprets certain laws based on the facts at hand in the case. In particular, nothing in the *Monterey Coastkeeper* opinion defines "quantifiable milestone" in a way that makes numeric discharge limitations the only acceptable mechanism of regulating nonpoint source discharges. The opinion rejected certain conditions included in the prior modified waiver as non-compliant with the NPS Policy, but did not specify specific means of curing the identified issues.

### D. The Central Coast Water Board Does Not Have the Legal Authority to Limit the Use of Pesticides or Fertilizers

With respect to both pesticides and fertilizers, the Central Coast Water Board is limited to regulating the discharge of waste, not the application or use of a lawful, useful substance. (Wat. Code, § 13263.) Waste is defined as "sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation." (Wat. Code, § 13050(d).) lawfully applied pesticides and fertilizers are not waste substances, but rather useful substances that are integral to successful agricultural production.

The Clean Water Act also defines "pollutant" as, among other things, chemical or agricultural *waste*, and does not broadly define the term to include all agricultural chemicals, especially those applied for a beneficial purpose. (33 U.S.C. § 1362(6) [The Clean Water Act

uses the term "pollutant" in a similar fashion to how Porter-Cologne uses the term "waste"].) The usage in the Clean Water Act acknowledges the difference between a useful substance and a waste substance, with only the latter being the focus.

Because the application of pesticides and fertilizers cannot be considered "waste," the application of such inputs to fields cannot then be considered a discharge of a waste. Despite this limitation, the Options Tables include limitations on the application and use of both pesticides and fertilizers. Table 1 proposes that Ag Order 4.0 include application limits ("$A_{FER}$ cannot exceed TBD lbs/ac/crop"), and a prohibition on the use of fertilizers ("[r]anches that repeatedly exceed the numeric discharge limit per the time schedule may be limited or prohibited from applying $A_{FER}$"). Similarly, Table 2 includes this application limit, "[r]anches that repeatedly exceed the nitrate, ammonia and/or orthophosphate discharge limit per the time schedule may be limited or prohibited from applying nitrogen and/or phosphorous from fertilizers, compost and/or other amendments." And, Table 3 includes the following: (1) "[r]anches that repeatedly exceed the pesticide concentration discharge limit per the time schedule may be limited or prohibited from applying that pesticide[]"; and, (2) "[r]anches that repeatedly exceed the toxicity discharge limit per the time schedule may be required to complete a toxicity identification evaluation to identify chemicals causing toxicity. Ranches may be limited or prohibited from applying the pesticide(s) that caused the toxicity." These proposed application limits in the Option Tables exceed the Central Coast Water Board's authority under Water Code section 13263.

In addition to these limits on fertilizer and pesticide use being beyond the Central Coast Water Board's authority to impose, Porter-Cologne prohibits the Central Coast Water Board from dictating the manner of compliance with its regulations. (See section II.G below.) And, with regard to pesticides, the Department of Pesticide Regulation (DPR), not the Central Coast Water Board, has exclusive legal authority to regulate the registration and use of pesticides.

### E. The Use of Pesticides Is Regulated Exclusively by the Department of Pesticide Regulation

California has regulated pesticides for over a century. Although the United States Environmental Protection Agency (US EPA) promulgates minimum pesticide requirements, California's regulations are far more comprehensive. The California Legislature has established a comprehensive body of law to control every aspect of pesticide sales and use. California's DPR is mandated by law to protect the public health and environment by regulating pesticide sales and use and by fostering reduced-risk pest management. (Food & Agr. Code, § 11501.)

The California Food and Agriculture Code, divisions 6 and 7, and implementing regulations promulgated at title 3 of the California Code of Regulations, division 6, establish California's comprehensive program under which DPR regulates the manufacture, distribution, sale, and use of pesticides. The program seeks to provide for the proper, safe, and efficient use of pesticides essential for production of food and fiber, and to protect the public health and safety and the environment from harmful pesticides by ensuring proper stewardship of those

pesticides.[4] (Food & Agr. Code, § 11501, *Californians for Alternatives to Toxics v. California Department of Pesticide Regulation* (2006) 136 Cal. App. 4th 1049, 1057 [citing Food & Agr. Code, § 11501]; see also *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 481 ["Among the stated purposes of the regulatory scheme are: the proper, safe and efficient use of pesticides essential for production of food and fiber, protection of the public health and safety, protection of the environment from harmful pesticides by prohibiting, regulating or controlling uses, assurance of safe working conditions for agricultural and pesticide control workers, permitting pest control by licensees under strict control of the director and county agricultural commissioners, and encouragement of pest management systems stressing application of biological and cultural control techniques with selective pesticides with the least possible harm to non-target organisms and the environment."].)

As clearly stated in Food and Agricultural Code section 11501.1, DPR, the state agency vested with pesticide regulation, and the Food and Agricultural Code as implemented by DPR, occupies the entire field of regulation for use, sale, registration, and transportation of pesticides to the exclusion of all local regulation.[5] (Food & Agr. Code, § 11501.1; *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 495.) When it passed section 11501.1, the Legislature stated that "matters relating to (pesticides) are of a statewide interest and concern and are to be administered on a statewide basis by the state unless specific exceptions are made in state legislation for local administration." (Stats. 1984, ch. 1386, §§ 1-3, p. 4879; see also Food & Agr. Code, § 12841(e) ["It has been and continues to be the intent of the Legislature that this division requires the department to register all pesticides prior to their sale for use in this state and, except as otherwise provided by law, requires the department to

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[4] California's comprehensive pesticide regulation program delegated to DPR controls every aspect of pesticide sales and use, and includes requirements for the protection of human and environmental health, including protection and monitoring of water quality. (For example, see DPR's Environmental Monitoring Programs and Projects, available at <https://www.cdpr.ca.gov/docs/emon/ehap.htm> (last accessed Jan. 10, 2019) which "monitors the environment to determine the fate of pesticides, protecting the public and the environment from pesticide contamination through analyzing hazards and developing pollution prevention strategies.")

Before a pesticide may be registered in California, DPR conducts a risk-benefit analysis and considers various factors that include acute and chronic health effects, the potential for environmental damage, "[t]he availability of feasible alternatives," and efficacy. (Cal. Code Regs., tit. 3, § 6158; Food & Agr. Code, § 12824.) The code requires DPR to examine whether a pesticide demonstrates "serious uncontrollable adverse effects either within or outside the agriculture environment" and "less public value or greater detriment to the environment than the benefit received by its use," and cancel a pesticide for "which there is a reasonable, effective, and practicable alternate material or procedure that is demonstrably less destructive to the environment." (Food & Agr. Code, § 12824, citing Food & Agr. Code, § 12825(a), (b), and (c).) Even after the DPR registers products, DPR must continually reevaluate them and may also cancel registrations. (Cal. Code Regs., tit. 3, §§ 6220-6226.)

[5] "If a local governmental agency attempts to regulate the sale or use of pesticides that is not allowed by the Food and Agricultural Code, DPR is required to notify the agency and, if not withdrawn, take legal action to have it declared null and void, and enjoin its enforcement." (Department of Pesticide Regulation, *Pesticide Use Enforcement Program Standards Compendium, Volume 1: General Administration of the Pesticide Use Enforcement Program* (Nov. 2017) p. 1-6 <https://www.cdpr.ca.gov/docs/enforce/compend/vol_1/chapter_1.pdf> [last accessed Jan. 11, 2019].)

regulate and control the use of pesticides in accordance with this division."].) The statute makes no exceptions to the Legislature's exclusive and preemptive occupation of the "whole field" of pesticide use regulation. Rather, the Legislature was explicit in its intent that the regulation and control of pesticides is of statewide concern and should be regulated on a statewide basis, preventing ad hoc regulation by local or regional entities, such as the Water Board, and that the field of pesticide regulation is preempted by DPR.

Although section 11501.1 clearly states the intent for the statewide regulation of pesticides vested with DPR, the provision does not limit authority of a state agency to enforce or administer any law that the agency or department is authorized or required to enforce or administer. Nevertheless, the Central Coast Water Board does not have any authority to regulate the application and use of pesticides. Water Code section 13002(d) states that nothing in Porter-Cologne limits the power of a state agency in the enforcement or administration of any provision of law which it is specifically permitted or required to enforce or administer. In other words, Porter-Cologne does not affect, override, or limit the powers and rights specifically vested to DPR regarding the regulation of pesticides. Additionally, Porter-Cologne does not provide the Central Coast Water Board with authority to restrict the use of pesticides, and use of pesticides alone is not illegal. Regional board authority resides in imposing reasonable requirements on the discharge of waste – not the application of pesticides.[6] (Wat. Code, §§ 13260(a); 13263; 13267; 13269.) Further, under Water Code section 13360, the Central Coast Water Board cannot legally limit or prohibit the application of fertilizers, pesticides, etc., nor take any action that specifies the "design, location, type of construction, or particular manner in which compliance may be had" in Ag Order 4.0. (See section II.F below.)

Importantly, the Final Report which led to the adoption of Porter-Cologne states as follows:

> The choice and use of pesticides and herbicides in agriculture have not been and cannot be directly regulated by the water quality control boards. Such regulation is outside the scope of present water quality law. However, discharges of waste water into waters of the state can be regulated. If any upstream additives cause an unreasonable degradation of water quality at the discharge point, they can be regulated indirectly by establishment of requirements on the discharge itself or on the receiving water.

(Final Report, *supra*, at pp. 41-42.)

[6] While the Regional Board may have the authority, as outlined in Porter-Cologne, to reasonably regulate irrigated agriculture that creates a discharge of waste under waste discharge requirements or conditional waivers, the Water Board does not have the unfettered regulatory authority to regulate all agricultural practices. (Wat. Code, §§ 13263; 13269.) A fundamental limitation to the Water Board's authority is that an activity must result in a "discharge of waste" that impacts water quality in order for that activity to be subject to regulation. (Wat. Code, §§ 13260(a); 13263; 13267; 13269.)

The Legislature has found that agriculture is a major and essential component of California's economy and continued viability of the agricultural economy is of paramount importance to the people of California. (Cal. Code Regs., tit. 3, § 6100(a)(1)-(2); Food & Agr. Code, § 12786.) These findings, taken together with the legislative mandate to provide for the proper, safe, and efficient use of pesticides on a statewide level, demonstrate the Legislative intent that this comprehensive scheme "occupy the whole field" of regulation regarding pesticide use in California. (Food & Agr. Code, § 11501.1.) Since DPR and only DPR is specifically vested with the power to administer the registration and use of pesticides, application limits on pesticides improperly interfere with DPR's power to administer pesticide use laws.

Growers within the Central Coast must comply with all applicable federal and state pesticide regulations, which, by their mandatory regulations, require strict compliance with all requirements when using and applying pesticides. If noncompliance is found, the statutes and regulations specify the manner in which penalties will be assessed. Given the full statutory scheme on both the federal and state levels, which occupies the entire field of pesticide registration, sale, transportation, and use, and the Central Coast Water Board's limited authority to regulate only the discharge of waste affecting beneficial uses to waters of the state,[7] an attempt by the Central Coast Water Board to impose additional regulations restricting pesticide use would be improper and void.

### F. Porter-Cologne Prohibits Dictating the Manner of Compliance

Although regional boards may impose waste discharge requirements (or conditions in waivers) on dischargers, including irrigated agriculture, such conditions cannot specifically dictate the manner of compliance. (Wat. Code, § 13360(a).) Water Code section 13360(a) provides in pertinent part that:

> No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner.

In other words, section 13360 allows the Central Coast Water Board to identify the "disease and command that it be cured," but prohibits the Water Board from dictating the cure. (See *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal.App.3d 1421, 1438 [*Tahoe-Sierra*].) Limiting the application of lawful agricultural inputs such as pesticides and fertilizers is dictating the cure, which is specifically prohibited by section 13360. Dictating buffer strips and mandating vegetative filter strips also dictates the cure and is prohibited by section 13360.

[7] Wat. Code, §§ 13260(a); 13263; 13267; 13269.

### G. Monitoring and Reporting Requirements in Ag Order 4.0 Need to Guard Against Requiring Disclosure of Trade Secrets, Proprietary Information, or Violating Individual Rights to Privacy

An ongoing issue throughout implementation of the irrigated agricultural regulatory program is the need to strike a proper balance between the Central Coast Water Board's need for adequate reporting to ensure compliance with the Ag Order's provisions and the need to protect grower privacy rights, including the confidentiality of trade secrets and other proprietary information. With the development of Ag Order 4.0, we see this debate continuing and offer the following comments.

Unlike the approach in the ESJ Order, growers and agricultural landowners in the Central Coast apply directly to the Central Coast Water Board for coverage under the Ag Order, and data and information is generally reported individually (with an exception for those who participate in coordinated surface water monitoring). Because of this individual reporting element, it is even more imperative that the Central Coast Water Board carefully consider what is being required to be reported so that trade secrets, proprietary information, and privacy are protected to the extent allowed by law.

#### 1. Confidentiality of Grower Information Is Protected by the Right to Privacy, and Supported by State and Federal Conduct in Similar Circumstances

California law prohibits the public disclosure of crop yields. (Food & Agreement. Code, § 58781.) Accordingly, the Central Coast Water Board would be similarly barred from requiring the reporting of post-production crop yields and making such information public. To do so means that members of the public could easily calculate individual grower's economic information. This runs directly counter to other statutes that protect individual crop yield data from public disclosure.[8]

Further, both state and federal law prohibit the public disclosure of specific management practices that qualify as propriety business information, such as the timing of nitrogen application. (Wat. Code, § 13267(b)(2).) The combination of such information is akin to mechanical processes and/or secret recipes that are protected for other industries. (Evid. Code, § 1060; see also 40 C.F.R. § 2.203 [outlining the Clean Water Act's business confidentially claim procedures].) Agriculture should be afforded the same protections and such information should be shielded from public disclosure.

Nor do federal and state public disclosure laws mandate a different result. Both federal and state law recognize the importance of grower confidentiality and take extra steps to protect it. Like California's Public Records Act (PRA), the federal Freedom of Information Act (FOIA) generally promotes disclosure of public records with limitations built in to protect personal information. FOIA includes a statutory exemption for "geological or geophysical information

[8] See, e.g., Food & Agr. Code, § 58781.

and data, including maps, concerning wells[,]" so that public agencies complying with FOIA are not required to disclose such information. (5 U.S.C. § 552(b)(9).) Courts consistently interpret this exemption to allow agencies to withhold information about a water well's location and depth. (*AquAlliance v. United States Bureau of Reclamation* (D.D.C. 2015) 139 F.Supp.3d 203, 209-211 (*AquAlliance*); *Nat'l Res. Def. Council v. U. S. Dept. of Defense* (C.D. Cal. 2005) 388 F.Supp.2d 1086, 1107-1108 (*NRDC*).) When challenged, agencies have been allowed to withhold maps showing the location of wells and construction reports detailing characteristics such as well depth. (*AquAlliance*, *supra*, 139 F.Supp.3d at p. 209; *NRDC*, *supra*, 388 F.Supp.2d at p. 1108.)

Additionally, federal law prohibits the United States Department of Agriculture (USDA) from disclosing farm information about "the agricultural operation, farming or conservation practices, or the land itself" or geospatial information provided to participate in USDA programs, or geospatial information for these farms. (7 U.S.C. § 8791(b)(2); *Ctr. for Biological Diversity v. U.S. Dept. of Agriculture* (9th Cir. 2010) 626 F.3d 1113, 1115-1116 [allowing USDA to withhold GPS coordinates of locations where wolf depredation occurred to protect ranchers' personal privacy].) This statute alone justifies withholding farm information, but the justification for withholding is further strengthened by a FOIA exemption that makes FOIA inapplicable to matters that are exempt from disclosure under another statute. (5 U.S.C. § 522(b)(3); *Cent. Platte Natural Res. Dist. v. U.S. Dept. of Agriculture* (8th Cir. 2011) 643 F.3d 1142, 1148 [holding USDA was not required to disclose GIS data that identified individual farmers, operators, and other agricultural producers]; *Zanoni v. U.S. Dept. of Agriculture* (D.D.C. 2009) 605 F.Supp.2d 230, 237 [holding that even disclosure of only names is prohibited].)

The Central Coast Water Board should also look to state-level marketing orders, which also strongly protect grower identities and a broad range of important grower information. For example, the marketing order for California raisins requires that all proprietary information, including names and addresses, production quantities, prices paid, and trade secrets, remain confidential. (State of California Department of Food and Agriculture Marketing Branch, *Marketing Order for California Raisins*, p. 15.; see, e.g., Food & Agr. Code, § 58781.) The marketing order states that these confidentiality requirements are enforced notwithstanding any other provision of law. (*Id.*)

Confidentiality of grower information is clearly valued and supported at the federal and state levels, and under general concerns regarding privacy. The State Water Board has made significant strides in striking a balance between making relevant water quality information available to the public and protecting private grower information in the ESJ Order. We ask here that the Central Coast Water Board provide agriculture the same courtesy and respect, and carefully balance its need for obtaining certain data and information with grower rights to privacy and protection of proprietary business information.

### 2. The *Zamora* Case Is Factually Inapplicable

Contrary to what will likely be argued by opposing interests, the superior court decision in *Zamora v. Central Coast Regional Water Quality Control Board*, (Super. Ct. San Luis Obispo

County, Oct. 28, 2016, Case No. 15CV-0247) (*Zamora*), has little relevance to provisions being developed for Ag Order 4.0.

First, the *Zamora* decision is a superior court decision that has no precedential value on proceedings outside of those that were brought directly before that court. (*Santa Ana Hospital Medical Center v. Belshé* (1997) 56 Cal.App.4th 819, 830-831.) In the *Zamora* case, the Environmental Law Foundation challenged agreements between the Central Coast Water Board and the Central Coast Groundwater Coalition (CCGC) with respect to certain information collected by the CCGC on behalf of its members. Since that case was decided, and due to further revisions to Ag Order 3.0 in March of 2017, this agreement and practice is no longer in place or applicable. Thus, given that any concerns raised in *Zamora* are now moot, the Central Coast Water Board should reject any argument relying on the *Zamora* decision on that basis alone.

Second, the information at issue in the *Zamora* case was very narrow, pertaining specifically to landowner and/or grower names and addresses that had a responsibility to notify domestic well users if a domestic well exceeded a drinking water standard. To that end, the superior court considered whether notification and compliance letters between a third party coalition, growers, and domestic well users – which included names and addresses of the growers and well users – had to be made publicly available. Notably, the letters were only triggered to be sent by and between the coalition, growers, and domestic well users when testing revealed that water in a domestic well exceeded a drinking water standard. Thus, in addition to balancing privacy interests versus the public disclosure of water quality data, there was a public health and safety component due to an identified exceedance at issue before the superior court, which shifted the balance in favor of public disclosure. That is not the type of information we are referring to here. Rather, unlike the facts before the superior court in *Zamora,* we are asking the Central Coast Water Board not to request or require the reporting of post-production crop yield data, or management practice information related to the timing and application of nitrogen fertilizers. Indeed, domestic well data and information are not proposed for any protection whatsoever in the Ag Alternatives we have put forth in Exhibit 2.

## III. Additional Detailed Responses to the Options Tables

### A. Table 1: Irrigation and Nutrient Management for Groundwater Protection

As discussed in section II.D above, proposed restrictions on the use of fertilizers themselves are beyond the Central Coast Water Board's authority to impose. We defer to our previous comments on this issue, and do not repeat them here. Besides application and use limits, Options Table 1 also proposes discharge limits, and requests the public to respond regarding appropriate time schedules. It further proposes an Irrigation and Nutrient Management Plan, individual discharge to groundwater monitoring, and groundwater quality trend monitoring to satisfy monitoring and reporting requirements. We offer our comments below.

### 1. The Proposed Discharge Limitation Is Contrary to the State Water Board's Direction in the ESJ Order

Options Table 1 proposes a nitrogen discharge limitation based on an equation of fertilizer applied, irrigation water applied, and crop removal values: $A_{fer} + A_{irr} - R$ (A-R) = TBD lbs/ac/ranch/year. The adoption of a discharge limit based on A-R is contrary to the State Water Board's directive in the ESJ Order for several reasons.

First, it is expected that the Central Coast Water Board will spend time developing R coefficient values for Central Coast crops before using R as a metric in any Ag Order 4.0 requirements. As noted in the ESJ Order, which is particularly applicable to the Central Coast's vast array of specialty crops, "[t]here is insufficient information currently available to calculate the R value for most crops." (ESJ Order, *supra*, p. 41.) In Exhibit 2, we recommend that the Central Coast Water Board develop and approve R coefficients for 95 percent of the total crop acreage in the Central Coast before requiring growers to use the R metric in Irrigation and Nutrient Management Plans (INMB) and in Summary Reports. Waiting until 95 percent of crop acreage has an approved R metric is consistent with the ESJ Order as applied in the Central Valley, in that the East San Joaquin Coalition needs to identify coefficients for 95 percent of crop acreage before using it in INMPs and Summary Reports, and because the State Water Board specifically called out regional board discretion to determine the number of crops and the timeline for development of coefficients. (ESJ Order, *supra*, p. 42.)

Second, the ESJ Order refers to A and R, and in particular the ratio of A/R as a "new metric for nitrogen application management." (ESJ Order, *supra*, p. 36.) Relying on the Agricultural Expert Panel, the ESJ Order sets forth the multi-year A/R ratio (or alternatively a multi-cropping cycle) as a performance metric for measuring nitrogen left in the field. A high multi-year or multi-cropping cycle ratio is then to be used, in this case by the regional board, to conduct education and outreach to outliers. Use of such information for purposes beyond education and outreach to outliers is not anticipated or directed in the ESJ Order. (*Id.* at p. 73.) Rather, the State Water Board clearly states that it is premature to use the A/R ratio target values as a regulatory tool: "It is premature at this point to project the manner in which the multi-year A/R ratio target values might serve as regulatory tools. That determination will be informed by the data collected and the research conducted in the next several years. If we move forward with a new regulatory approach in the future, we expect to do so only after convening an expert panel that can help evaluate and consider the appropriate use of the acceptable ranges for multi-year A/R ratio target values in irrigated lands regulatory programs statewide." (*Id.* at p. 74.)

Third, use of a nitrogen discharge limit goes beyond what the experts who testified before the State Water Board thought was scientifically supportable. For example, during the ESJ Order proceedings, Dr. Thomas Harter from the University of California, Davis stated that "the A over R ratio is completely sufficient to do an assessment of how much crops contribute relative to each other, to nitrate and groundwater, how farmers are doing relative to each other, and to give us a tool to do trend assessment and larger regional establishments." (Transcript of Proceedings, State Water Resources Control Board Workshop on Review of Eastern San Joaquin

Agricultural General WDRs (May 17, 2016), p. 28:17-22 (ESJ WDRs Transcript).) Other experts opining on the A/R ratio acknowledged its limitations, particularly that insufficient information regarding A/R ratios in California crops currently exist and such ratios and targets must be developed and refined as data is gathered. (ESJ WDRs Transcript, pp. 60-64.)

Fourth, in the ESJ Order the State Water Board refers to A-R difference data as being informative to focus on follow-up management practice implementation as well as research and modeling on groundwater loading. (ESJ Order, *supra*, p. 39.) Nowhere in the ESJ Order, or during the State Water Board's proceedings, did the State Water Board or its staff suggest, recommend, or advocate for use of A-R as a numeric discharge limit. Accordingly, use of A-R as a discharge limit would completely take out of context the State Water Board's reasons for referencing the difference value between A-R in addition to the A/R ratio.

Finally, use of a discharge limit based on A-R for an amount that is designed to ensure that no residual nitrogen is available for potential leaching to groundwater would surely cripple the economic sustainability of Central Coast agriculture. The Central Coast region is unique in that it has weather and topography to support specialty crops, which rely on multi-cropping cycles to maintain the economics of farming. This is due to a combination of factors, including high land values, high labor costs, labor-intensive crops, and costs related to food safety, in addition to a plethora of other regulatory restraints put on Central Coast farming. Applying a nitrate discharge limit that essentially limits the number of pounds of nitrate that can be applied per acre per ranch per year would more than likely eliminate multi-cropping cycles, which would in return eliminate the economic viability of many crops along the Central Coast. As discussed previously, consequences such as this run afoul of the Legislature's directives with respect to implementation of Porter-Cologne, which is to regulate to the highest level that is reasonable – considering all the demands placed on the waters.

### 2. The Central Coast Water Board Cannot Legally Impose Restrictions on the Amount of Irrigation Water that Percolates to Groundwater

Besides the discharge limit and use restrictions, Options Table 1 suggests that individuals may be required to monitor irrigation discharges to groundwater for both nitrate concentration and volume. This approach is inappropriate because it contradicts California law and the monitoring would exceed the usefulness of the information gathered.

The use of irrigation water on agricultural fields is not a discharge of a waste. In fact, regulations state that no discharger "shall be required to file a report of waste discharge pursuant to section 13260 of the Water Code for percolation to the groundwater of water resulting from the irrigation of crops." (Cal. Code Regs., tit. 23, § 783.) On this basis, the Regional Board has no authority to regulate the use of irrigation water or the amount of irrigation water that percolates to groundwater, because this percolation is not a discharge of a waste.

From an economic standpoint, monitoring the amount of nitrate in irrigation water that goes beyond the root zone would be impractical, and the burden of monitoring such discharges

would come at a cost that is well beyond the usefulness of the information. This, in turn, would violate Water Code section 13267, which places reasonableness and practical constraints on the regional board's authority to require technical reports and monitoring. (See Wat. Code, §13267 ["The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports."].)

### B. Table 2: Irrigation and Nutrient Management for Surface Water Protection

Options Table 2, like Options Table 1, proposes to use application limits or prohibitions on the use of fertilizers. As explained in detail in section II.D above, the use of fertilizer on agricultural land is not the discharge of a waste. Because applying fertilizer is not a waste discharge, the Central Coast Water Board would exceed its authority under Water Code section 13263 if it were to restrict or prohibit the application of fertilizers.

Similarly, the proposal in Options Table 2 to limit or prohibit fertilizer use violates Water Code section 13360. Again, Water Code section 13360 prohibits the Central Coast Water Board from dictating the manner of compliance with permit conditions. "[T]he Water Board may identify the disease and command that it be cured but not dictate the cure." (*Tahoe-Sierra Preservation Council v. State Water Resources Control Board* (1989) 210 Cal.App.3d 1421, 1438.) Table 2 would directly prohibit, or otherwise limit, the use of fertilizer on agricultural land rather than requiring discharges from those lands to meet certain specifications. (Compare with *ibid.* [holding that a discharge prohibition based on actual discharges did not violate Water Code section 13360 because the requirement did not specify how the discharger must comply].) Dictating how growers in the Central Coast must operate their farms to meet the water quality goals in Ag Order 4.0 would violate Water Code 13360. The Central Coast Water Board should reject the Options that include fertilizer application limits and/or use prohibitions because such requirements both exceed the Central Coast Water Board's authority and would violate Water Code section 13360.

### C. Table 3: Pesticide Management for Surface Water and Groundwater Protection

#### 1. The Central Coast Water Board Cannot Legally Impose Pesticide Application Limits

Options Table 3 proposes numeric discharge limits for pesticide concentrations in amounts yet to be determined, for certain pesticides yet to be determined, numeric discharge limits for toxicity based on number of allowed toxic samples, application limits for certain pesticides in an amount yet to be determined for ranches that repeatedly exceed pesticide concentration limits, and potential prohibitions for the application of pesticides if a ranch repeatedly exceeds discharge and/or application limits for pesticides. As described above (see Pesticide Preemption section, II.E above), the Central Coast Water Board cannot legally impose pesticide application limits. (Food & Agr. Code, § 11501.1; Wat. Code, § 13002). DPR is specifically vested with the power to administer the registration and use of pesticides; Porter-

Cologne does not provide the Central Coast Water Board with authority to restrict the use of pesticides. Thus, application limits on pesticides interfere with DPR's power to administer pesticide use laws. Further, the Water Board's authority is limited to imposing reasonable requirements on the *discharge of waste* – not the application of pesticides. (Wat. Code, §§ 13260(a); 13263; 13267; 13269) while not dictating the manner of compliance. (Wat. Code, § 13360.)

### 2. The Central Coast Water Board Cannot Legally Impose Prohibitions on the Use of Pesticides

Similarly, the Central Coast Water Board cannot legally impose prohibitions on the use of pesticides. (See Sections II.D and II.E above.) Although the Water Board has the statutory authority to reasonably regulate and protect water quality, that authority is not without limitations. (See Wat. Code, § 13243; compare to Wat. Code, § 13263 and § 13269 which do not allow blanket prohibitions of discharges as part of waste discharge requirements or conditional waivers.) As such, the Water Board cannot prohibit the manner of use or amount of certain pesticides. The Water Board has no authority to regulate pesticides. Rather, the California Legislature has established a comprehensive body of law to control every aspect of pesticide sales and use and has deemed DPR to be the entity with authority protect the public health and environment by regulating pesticide sales and use and by fostering reduced-risk pest management. (Food & Agr. Code, §§ 11454, 11454.1, 12981.**)**

Further, the use of pesticides to assist in agricultural production is a legal use explicitly recognized by the Legislature. (Food & Agr. Code, §§ 822; 11501; 12786; Cal. Code Regs., tit. 3, § 6100 (quoting the findings of the Legislature in Section 1, Chapter 308, Statutes 1978), [The Legislature has repeatedly voiced its desire for a healthy and robust agricultural industry, recognizing the essential role that pesticides perform in supporting that industry.].) The Legislature has continually declared that agriculture is a major and essential component of California's economy and continued viability of the agricultural economy is of paramount importance to the people of California; as such, the continued and "proper, safe and efficient use of pesticides is essential for the protection and production of agricultural commodities and for health protection." (Cal. Code Regs., tit. 3, § 6100(a)(1)-(2); Food & Agr. Code, § 12786.) Therefore, the pesticide discharge prohibitions within the Options Tables are unlawful and exceed the Central Coast Water Board's authority.

### 3. Pesticide Water Quality Objectives Have Not Been Properly Adopted

Options Table 3 proposes numeric (although the number is currently to be determined) pesticide water quality objectives and associated triggers for follow-up receiving water monitoring and individual discharge monitoring. These requirements are improper, as the Central Coast Water Board has not adopted *any* numeric pesticide water quality objectives (WQOs). (See Wat. Code, § 13241.)

Porter-Cologne requires WQOs to ensure reasonable protection of beneficial uses. (Wat. Code, § 13241.) As outlined in Water Code section 13241, "each regional board shall establish water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance." Within its Basin Plan, the Central Coast Water Board has established numerous general narrative and numeric WQOs, including a narrative WQO for pesticides. (Central Coast Basin Plan, pp. 29-31.)

Before being used as a numeric limit, a pesticide WQO must be adopted properly, pursuant to Water Code sections 13240 et seq., and must be based on proper evidence. The Central Coast Water Board cannot incorporate by reference or rely on analytical numeric values to interpret and apply the narrative pesticide WQOs within its Basin Plan, without at least having an adopted policy for such interpretations. No such policy exists in the Basin Plan.

### D. Table 4: Sediment and Erosion Management for Surface Water Protection

#### 1. The Central Coast Water Board Cannot Legally Impose Limitations on the Alteration of Receiving Water Channels as Such Alterations are Not WQOs or a Discharge of Waste

Options Table 4 proposes limitations on the alteration of receiving water channels through a requirement in which "no discharge may cause or contribute to altering the receiving water channel through scour, bank failure, downcutting, or sediment accumulation." In other words, Options Table 4 proposes conditions preventing the hydrologic modification of a channel. But a channel is not a pollutant or a constituent, and the alteration of a receiving water channel is not a discharge of waste. (See Wat. Code, § 13050.) The alteration of a receiving water channel is also not an adopted WQO within the Central Coast Water Board's Basin Plan. The Central Coast Water Board's regulatory authority is not infinite; rather, the Water Board's authority is limited to the reasonable regulation of discharges of waste. (See Section I.A, above.) This is done through the establishment of waste discharge requirements pursuant to Water Code section 13263 to protect beneficial uses and to meet appropriate WQOs. (Wat. Code, § 13241; Basin Plan, *supra*, p. 29.) Given that alterations to receiving water channels are not WQOs or discharges of waste, the Water Board cannot impose such limitations.

In addition to attempting to regulate a receiving water channel, Options Table 4 attempts to control the flow of water through channels. Similar to a channel, flow itself is not a pollutant or a constituent under the regulatory authority of the Central Coast Water Board. Further, any attempt to regulate flow improperly regulates water rights, which only the State Water Resources Control Board has the authority to regulate.

#### 2. Prohibition on the Discharge of Sediment Due to Erosion May Create Impossibility of Performance

"The law never requires impossibilities." (Civ. Code, § 3531.)

(See discussion in Section I.D; see also *National Shooting Sports, supra*, 5 Cal.5th 428.)

### 3. The Prohibition on Stormwater Discharges from Agricultural Land Is an Improper Prohibition as Stormwater Is Not a Pollutant or a Discharge of a Waste

Options Table 4 proposes stormwater discharge limitations on ranches with impermeable surfaces. Such a limitation on stormwater discharges is an improper prohibition, however, as stormwater is neither a pollutant nor a discharge of a waste under state or federal law.[9] (See Wat. Code, § 13050.)

Porter-Cologne focuses on receiving waters – such that runoff is rendered a discharge of "waste" only if it contains harmful concentrations of pollutants. (See State Water Resources Control Board, Order WQ 2001-15, p. 12, [concluding that stormwater is not waste *per se*; rather, it is the pollutants in runoff that are waste].) The State Board clearly concluded that "it is the waste or pollutants in the runoff that meet these definitions of "waste" and "pollutant," and not the runoff itself." (*Ibid*.)

Additionally, in the 1977 amendments to the Clean Water Act, Congress expressly reversed a court decision which would have required NPDES permits for return flows from irrigated agriculture. Congress accomplished this through amendments to the CWA: (1) exempting irrigation return flows from permitting (33 U.S.C. § 1342(l)(1)), and (2) excluding return flows from the definition of point source (33 U.S.C. § 1362(14). The legislative history of the amendments demonstrates that Congress had assumed that such discharges from irrigated agriculture would be nonpoint source discharges. (3 Legislative History of the Clean Water Act, 1978 at 527.) Case law has further reiterated that agricultural stormwater runoff is not a discharge of pollutants from a point source under the federal CWA: "We believe it reasonable to conclude that when Congress added the agricultural stormwater exemption to the Clean Water Act, it was affirming the impropriety of imposing, on "any person," liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather – even when those discharges came from what would otherwise be point sources. There is no authoritative legislative history to the contrary." (*Waterkeeper Alliance, Inc. v. U.S. E.P.A.* (2d Cir. 2005) 399 F.3d 486, 507.)

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[9] Porter-Cologne defines "waste" and "pollution" as follows:
"'Waste' includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal." (Wat. Code, § 13050(d).)
"'Pollution' means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:
(A) The waters for beneficial uses.
(B) Facilities which serve these beneficial uses.
(2) 'Pollution' may include "contamination.'" (Wat. Code, § 13050(*l*)(1).)

Given that rainwater itself is not a "waste" or "pollution" as defined within Porter-Cologne and that agricultural stormwater runoff is not a discharge of pollutants from a point source under the federal CWA, the prohibition on stormwater discharges from agricultural lands is an improper prohibition.

### E. Table 5: Riparian Habitat Management for Water Quality Protection

#### 1. The Central Coast Water Board Cannot Legally Impose Riparian Setbacks and Require Certain Percentages of Native Vegetative Cover

Options Table 5 proposes ranch-level setback width and percent native vegetative cover for riparian areas. Yet this proposal exceeds the Central Coast Water Board's authority because it cannot legally impose riparian setbacks and require certain percentages of native vegetative cover. A fundamental limitation to the Water Board's authority is that an activity must result in a "discharge of waste" that impacts water quality in order for that activity to be subject to regulation. (Wat. Code, §§ 13260(a); 13263; 13267; 13269.) Riparian habitat, setbacks, and native vegetative cover are not discharges of waste. Further, riparian habitat, setbacks, and native vegetative cover are not WQOs. Accordingly, the Central Coast Water Board cannot regulate riparian habitat and native vegetative cover under the guise of water quality protection. Moreover, regulating land use is not within the purview of the Regional Board.

Additionally, setback width and percentages of native vegetative cover requirements dictate the manner of compliance contrary to Water Code section 13360. The Water Board cannot prescribe how a discharger will comply with discharge requirements. (See Section II.F above.)

#### 2. There Are No Properly Adopted WQOs for Riparian Habitat Within the Basin Plan

The riparian habitat management requirements proposed in Option Table 5 are improper because there are no properly-adopted WQOs for riparian habitat. Porter-Cologne defines "water quality objectives" as the allowable "limits or levels of water quality constituents or characteristics that are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area." (Wat. Code, § 13050(i).) Riparian habitat is not a limit or level on water quality constituents or characteristics under Porter-Cologne. Further, it is not a "waste" that can be discharged, and thus regulated, under Porter-Cologne. (Wat. Code, § 13050(d).)

As specifically stated in the Central Coast Water Board's Basin Plan, "[i]n setting waste discharge requirements, the Regional Board will consider the potential impact on beneficial uses within the area of influence of the discharge, the existing quality of receiving waters, and the appropriate water quality objectives. The Regional Board will make a finding of beneficial uses to be protected and establish waste discharge requirements to protect those uses and to meet water quality objectives." (Basin Plan, p. 29.) Thus, waste discharge requirements (or conditional waivers of waste discharge requirements) protect beneficial uses and "meet water

quality objectives." Riparian habitat management, native vegetative cover, and setbacks are not water quality constituents. Further, riparian habitat management, native vegetative cover, and setbacks are not adopted WQOs and the Water Board cannot legally prescribe allowable limits or levels of riparian habitat, or prohibit their removal. (See Wat. Code, § 13050(h); see also Wat. Code, § 13240 et seq. regarding establishment of WQOs.)

### 3. Riparian Setbacks May Conflict with Food Safety Requirements Imposed by Buyers and Food Safety Programs and Threaten Public Health

In addition to the problems addressed above, the requirements to impose riparian setbacks in Option Table 5 may conflict with food safety requirements imposed by buyers and others.[10] Regulating land use is not within the purview of the Regional Board. The Water Code and the Basin Plan focus on water quality and discharges which may impair water quality. As discussed within, while the Regional Board has authority to regulate a discharge of waste, the Board does not have authority to require or regulate an act which is unrelated to discharges to waters of the state. (Wat. Code, §§ 13260(a); 13263; 13267; 13269; 13360.) In addition to exceeding its jurisdiction, riparian setbacks may deprive farmers from the economic benefit and use of their private property by prohibiting growers from complying with buyer specifications that may be necessary for food safety reasons.

## IV. CONCLUSION

In summary, many of the Options expressed in Options Tables 1 through 5 exceed the Central Coast Water Board's statutory authority. Others, while technically legal, may impact the economic viability of Central Coast agriculture so dramatically that they too may then exceed the Control Coast Water Board's statutory authority. As the Central Coast Water Board moves forward in developing Ag Order 4.0, we believe it is imperative for the Water Board to implement its authority in a reasonable and balanced manner.

[10] "In early 2007, with oversight by the California Department of Food and Agriculture (CDFA), produce industry representatives developed the California Leafy Green Products Handler Marketing Agreement (see www.caleafygreens.ca.gov). More than 100 handlers (companies that move fresh produce products from growers to retail and food-service buyers) are signatories. Representing more than 99% of the leafy greens production in California, they are obligated to handle leafy green produce only from growers who adhere to the best management practices detailed in the Commodity Specific Food Safety Guidelines for the Production and Harvest of Lettuce and Leafy Greens, known as the "Metrics" (see www.caleafygreens.ca.gov). The Metrics were developed and continue to be updated through a process involving the produce industry, government agencies, natural resource organizations and scientists." (Beretti et al., *Food safety and environmental quality impose conflicting demands on Central Coast growers* (April-June 2008) California Agriculture at p. 69.)